IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 606.

THE UNITED STATES OF AMERICA, *Petitioner*

v.

SAMUEL BAYER, ELIAS BAYER AND WALTER V. RADOVICH

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit

BRIEF FOR THE RESPONDENT WALTER V. RADOVICH

SAMUEL T. ANSELL
ROGER ROBB
Attorneys for Respondent.
Tower Building
Washington 5, D. C.

March 25, 1947.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX

	Page
Opinion Below	1
Jurisdiction	1
Questions Presented	2
Statutes Involved	2
Statement of Facts	2
I. The Confession	3
II. The Plea in Bar	14
Summary of Argument	19
Argument	23
I. The initial confession made by the respondent would have been inadmissible under the rule of *McNabb* v. *United States*, 318 U. S. 322, and *Anderson* v. *United States*, 318 U. S. 350; and the second confession which was received in evidence being the fruit of the first was inadmissible under the principle of *Silverthorne Lumber Company* v. *United States*, 251 U. S. 385, and *Nardone* v. *United States*, 308 U. S. 338	23
II. The Plea in Bar	35
A. The argument of the Government, that the respondent's plea of former jeopardy must fail because his conviction by court-martial was disapproved upon review, is based upon matters which are not in the record and not properly before this Court	35
B. Even if the extraneous matters which Government counsel have attempted to inject into the record should be considered by this Court, they would not affect the validity of the plea in bar	37
C. The military charges and the indictment alleged substantially the same offense, so that the trial of the respondent upon the indictment put him twice in jeopardy for the same offense	38
CONCLUSION	44

CITATIONS.

CASES:

	Page
Anderson v. United States, 318 U. S. 350	19, 23
Burton v. United States, 202 U. S. 344, 381	39
Carter v. McClaughry, 183 U. S. 365, 394	39
Gebardi v. United States, 287 U. S. 112, 122	41
Grafton v. United States, 206 U. S. 333	38
Lyons v. Oklahoma, 322 U. S. 596	34
Manning v. United States, 275 Fed. 29, 31	39
McClaughry v. Deming, 186 U. S. 49	21, 37
McNabb v. United States, 318 U. S. 332	19, 23, 32
Morgan v. Devine, 237 U. S. 632, 641	39
Nardone v. United States, 308 U. S. 338	19, 23, 34
Norris v. United States, 74 F. (2d) 839, 841	41
Silverthorne Lumber Company v. United States, 251 U. S. 385	19, 23, 34
United States v. Dietrich, 126 Fed. 664, 667	41
United States v. Katz, 271 U. S. 354, 355	41
United States v. N. Y. C. & H. R. R. Co., 146 [redacted] 298	41
United States v. Sager, 49 F. (2d) 725	41
United States v. Zenfi, 137 F. (2d) 843	41
Watson v. United States, 6 F. (2d) 870	34

TREATISES AND MANUALS.

Bishop's Criminal Law (8th Ed.) § 1052, sub. 2	39
Manual for Courts-Martial, U. S. Army (1921)	24, 38
Manual for Courts-Martial, U. S. Army (1943)	40
Military Justice Procedure, War Department Technical Manual T. M. 27-255 (1945)	24, 27, 29
Winthrop, *Military Law and Precedents* (2d Ed., 1920)	40, 42

STATUTES.

Article of War 40, 10 U. S. C. A. 1511	37
Article of War 50½, 10 U. S. C. A. 1522	37
Article of War 58, 10 U. S. C. A. 1530	26
Article of War 69, 10 U. S. C. A. 1541	19, 24
Article of War 70, 10 U. S. C. A. 1542	10, 20, 28, 29
Article of War 95, 10 U. S. C. A. 1567	16, 39, 40
Article of War 96, 10 U. S. C. A. 1568	17, 39, 40
Judicial Code, Section 240(a)	1

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 606.

THE UNITED STATES OF AMERICA, *Petitioner*

v.

SAMUEL BAYER, ELIAS BAYER AND WALTER V. RADOVICH

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit

BRIEF FOR THE RESPONDENT WALTER V. RADOVICH

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 1467-1476) is reported at 156 F. (2d) 964.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered August 14, 1946 (R. 1476). On September 13, by order of the Chief Justice, the Government's time to file a petition for a writ of certiorari was extended to October 12, 1946 (R. 1478). The petition for a writ of certiorari was filed October 11, 1946, and was granted December 9, 1946 (R. 1479). The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

QUESTIONS PRESENTED

(1) Whether a written confession taken from the respondent, an army officer, by a Special Agent of the Federal Bureau of Investigation, was rendered inadmissible by reason of the fact that it was based upon, the outgrowth of, and substantially the same as an earlier written statement taken from the respondent by the same agent while the respondent was being, and after he had been for approximately four weeks, unlawfully held in an army psychopathic ward, without counsel and under circumstances of great hardship and oppression.

(2) Whether the conviction of the respondent, an army officer, by a court-martial upon charges alleging that he was guilty of conduct unbecoming an officer and gentleman and conduct to the prejudice of good order and military discipline, in that he had accepted from two named individuals the sum of $7,000 for the purpose of effecting the transfer of two named soldiers to certain organizations not alerted or assigned for overseas movement, was a bar to the prosecution of the respondent in the District Court, upon an indictment charging that he conspired with the same two named individuals to defraud the United States of his honest services, and specifically charging that such conspiracy contemplated the acceptance by the respondent of $7,000 from the two named individuals for transferring the same two soldiers into units of the army which were not about to be sent out of the continental United States.

STATUTES INVOLVED

The pertinent statutes involved are set out in Appendix A to the petitioner's brief, pages 96-104.

STATEMENT OF FACTS

The respondent, Major Radovich, and two co-defendants, Samuel Bayer and Elias Bayer, were tried and convicted upon an indictment alleging that they conspired to defraud the United States of the faithful services of Radovich, an

officer of the United States Army, and specifically alleging that the conspiracy contemplated that Samuel Bayer and Elias Bayer would pay to Radovich the sum of $7,000, to induce Radovich in violation of his duty to transfer Privates Martin Bayer and Melvin Usdan to certain units of the army which were not to be sent out of the continental United States (R. 8).

I.

THE CONFESSION

The government offered in evidence against Radovich a written confession made by him to Special Agent Flynn of the Federal Bureau of Investigation on March 15 and 17, 1945. This statement, which was marked "Government's Exhibit 25" (R. 1396) and was admitted in evidence over the objection and exception of the respondent (R. 659), was the basis of the case against Radovich. The statement was in the handwriting of Flynn and was initialed and signed by Radovich. According to the statement, Radovich told Flynn that in consideration of $7,000 paid to him by Samuel and Elias Bayer during the summer and fall of 1943, while Radovich was an officer in the Army Air Corps, he had transferred Privates Martin Bayer and Melvin Usdan to certain units of the United States Army which were not to be sent out of the continental United States.

In the absence of the jury the Court heard testimony bearing upon the admissibility of the respondent's confession (R. 533-660). The statement having been admitted in evidence, the testimony heard by the Court in the absence of the jury was in large part repeated before the jury (R. 718-793).

The record disclosed the following facts respecting the confession taken from Major Radovich by Special Agent Flynn on March 15 and 17, 1945:

Special Agent Flynn testified that he took the confession from Radovich at the office of the Federal Bureau of Investigation at New York City; that Radovich, who at this time was stationed at Mitchel Field, Long Island, New

York,[1] came to Flynn's office at the request of Flynn; that before Radovich made the statement Flynn warned him that it might be used against him[2] (R. 536-538; 672-674).

Flynn testified (R. 538-540; 677 et seq.) that before taking the statement on March 15 and 17, 1945, he produced and showed to Radovich another written confession taken from Radovich by him on September 5 or 6, 1944. The statement of September 5 or 6, 1944, like that of March 15-17, was in the handwriting of Flynn and signed by Major Radovich (R. 539, 677). The March 15-17 statement on its face purported to be a "supplementary" statement (R. 1306), and Flynn admitted that it was "basically" the same as the previous statement taken on September 5 or 6, 1944 (R. 539-540; 677). He said that the March statement "went into more detail", that "Major Radovich had told me many more instances or circumstances which I thought should go into the statement, and I decided to put it in and make it one complete statement" (R. 677). He said that before taking the supplementary statement, he read over the previous one and handed it to Radovich, who also read it over; that the first statement was on Flynn's desk when he wrote the second one; that he produced the first statement at the suggestion of Radovich (R. 538-540; 677). Flynn admitted that he included in the supplementary statement, not all that Radovich told him, but only "most of what I considered important", although he said that he

[1] Major Radovich at this time was in a status of military arrest, and was under "administrative restriction", which meant that he was barred from the Officers Club and required to "secure the personal permission of the Base Commanding Officer prior to his departure from the limits of the Air Base at any time" (R. 767-768).

[2] In this connection, the confession contains only the statement by Major Radovich "I know that anything I say may be used in a criminal proceeding" (R. 1306). Flynn testified that he "got ahead" of himself when he was writing the confession, and left out the statement that it might be used against Radovich; that while he recognized the substantial distinction between the two phrases, his omission was not significant and specifically did not mean that he had assured Major Radovich that Radovich would not be indicted (R. 673-674).

did not leave anything out "with any design" (R. 673; 675-676).

A request by counsel for Radovich that the District Attorney produce the first written statement was denied by the District Attorney and by the Court, the ground of the Court's denial being that examination of the two statements by the Court revealed that there was no material conflict between them (R. 551, 552; 681; 901).

The evidence concerning the circumstances leading up to and surrounding the making of the two confessions by Major Radovich showed:

Major Radovich, who was then 24 years old (R. 721), returned to the United States from Burma in the late spring of 1944 (R. 720, 746, 752). While in Burma he had served with great gallantry and distinction as an officer of the First Air Commando Group (R. 746-752). He was awarded the Air Medal,[3] Distinguished Flying Cross,[4] the

[3] The citation for the Air Medal, dated 24 April, 1944, was (R. 746-747):

Citation: Served as pilot. For meritorious achievement in aerial flight displayed on a bombing mission in Northern Burma on 13 March, 1944, during which exposure to enemy fire was probable and expected. The mission was extremely dangerous due to heavy ground fire encountered and hazardous flying due to surrounding mountainous terrain. Enemy storage installations, trucks and barracks area were definitely destroyed.

Destruction of this great amount of enemy material seriously hampered the operations of the enemy in this sector and materially aided the allied effort in this theatre.

The successful accomplishment of this mission by these officers with a display of a devotion to duty and a degree of efficiency above and beyond that normally expected reflects great credit upon themselves and upon the Army Air Forces of the United States.

[4] The citation for the Distinguished Flying Cross was (R. 747):

For extraordinary achievement in aerial flight by participating in more than 50 flights over the combat areas of Northern Burma, where exposure to enemy fire was probable and expected. These flights performed in direct support of a new type of air-ground operations were largely instrumental in the successful operations of the (deleted) air commando group in

Oak Leaf Cluster to the Distinguished Flying Cross (meaning a second D.F.C.),[5] a Presidential Unit Citation,[6] and

this theatre. Close coordination was maintained between the bomber, fighter, glider, transport and light plane sections and the ground crew operations of the British, Indian, Chinese and American armies, when critically needed troops and supplies were flown in with both gliders and transports to the vital areas. This close liaison between air and ground operations was primarily responsible for our successes in the Burma area, with destruction of large numbers of enemy aircraft and critical damage to his installations, material and equipment, with a considerable loss of personnel which has materially reduced his effectiveness and ability to conduct any offensive action against the Allied forces.

These officers and enlisted men have displayed a devotion to duty and a degree of efficiency above and beyond that normally expected, thereby reflecting great credit upon themselves and upon the air forces of the Allied Nations.

Pilot from 26 December, 1943, to 25 April, 1944. Home address, 912 East 87th Street, Los Angeles, California.

[5] The citation for the Oak Leaf Cluster to the Distinguished Flying Cross, dated 25 June, 1944, was (R. 749):

For extraordinary achievement in aerial flight displayed on 8 March, 1944. Major Radovich was a member of a 21-plane fighter sweep over the enemy air field at Anasean, Burma, several hundred miles from home base. His plane was loaded with a large auxiliary fuel tank and one 500-pound bomb.

With complete disregard for the enemy antiaircraft and ground fire, he successfully bombed the objective and then joined the strafing pattern. In the successful accomplishment of this mission they destroyed 35 enemy planes, strafed ground personnel, trucks and antiaircraft positions, set the gasoline dumps afire and all buildings surrounding the field were completely burned.

This display of a devotion to duty and a degree of efficiency above and beyond that normally expected reflects great credit upon Major Radovich and upon the Army Air Forces of the United States.

Home address, 912 East 87th Street, Los Angeles, California.

[6] The citation for the Presidential Unit Citation, dated 9 April, 1945, was (R. 750):

The First Air Commando Group is cited for outstanding performance of duty in action during the period 1 December 1943 to 20 May 1944. The First Air Commando Group was given a mission so unusual that few individuals outside the organization considered it feasible. Lacking proper military facilities for the assembling of their equipment and deprived

the British Distinguished Flying Cross.[7]

On August 3, 1944, while stationed at the Santa Monica Redistribution Center, Santa Monica, California, not far from his home in Los Angeles (R. 721-728), he was ordered to report to Mitchel Field, New York (R. 733-734). He proceeded to Mitchel Field as ordered. Upon his arrival on August 9, 1944, he was immediately placed under arrest and locked up in the psychopathic or "nut" ward in the station hospital at the field (R. 564, 573, 591, 733, 766, 782). His uniform was taken from him and locked up and for clothes he was given only hospital pajamas without a string to tie up the pants, and a bathrobe without a cord (R. 561, 566, 732, 736). He was deprived of his razor, tooth brush,

---

for security reasons of native labor, officers and enlisted men assembled and tested the airplanes and equipment of the Group in record time. Fighter Pilots loaded bombs and refueled their own airplanes while enlisted personnel unloaded strings of box cars for future operations.

The task performed by the group normally called for strength of five times their personnel. The comparatively small assault force of the group flew as many as 682 missions in one month, and on one mission, on 8 March, 1944, destroyed 20 per cent of the known Japanese aircraft in Burma. The liaison section of the group evacuated as many as 700 sick and wounded in less than three weeks.

On D-Day the group displayed exceptional team work, destroyed the enemy positions, carried assault troops and engineers behind the enemy lines and supplied them until their mission had been accomplished.

This display of group heroesim and devotion to duty reflects highest credit on the First Air Commando Group and the military forces of the United States.

[7] The citation for the British Distinguished Service Cross was (R. 751):

This officer showed the highest courage on D.1 Day when he volunteered to fly in daylight in an undefended light plane across 180 miles of enemy-occupied Burma to Broadway, where a number of our troops had been wounded and where we appeared to have lost communication. He carried out this task successfully, delivered an operator with a radio set and ciphers and brought out a wounded man. Throughout, Major Radovich displayed complete disregard for his own personal safety and great devotion to duty.

toilet articles, money, shoes, pencils, and all personal belongings (R. 561 et seq., 736). He was placed in a small room or cell measuring approximately 9 x 6 feet, with rough concrete walls and floor, and a guard watched him constantly night and day, even when he went to the bathroom (R. 561-566, 738, 782-787). The other inmates of the ward were mental cases, drug addicts and alcoholics (R. 564, 733, 782). The ward was entered through a heavy steel door similar to that used in jails which was kept locked, and the windows of the ward, including that of the respondent's room, were covered with heavy steel grille work which was also locked (R. 562 et seq., 734 et seq., 782-787). The respondent's food was served on a tin platter, with no knife, and later he was deprived of both knife and fork, and required to eat all of his food, including his meat, with a spoon (R. 565, 737). The experienced hospital attendant in charge of the respondent testified without contradiction that he observed no abnormal conduct on the part of the respondent and saw nothing that indicated that the respondent needed restraint (R. 568; see R. 574). No medical treatment of any kind was given to or prescribed for the respondent (R. 742). The respondent was held in the psychopathic ward from August 9, 1944 to September 16, 1944 (R. 591-593, 766, 767). About two weeks after his incarceration began he was permitted a brief exercise period each day, in the company of an armed guard (R. 573, 781).

The uncontradicted evidence (R. 567-570; 576-577; 737-741; 783-787) showed that Major Radovich was held *incommunicado* in the psychopathic or "nut" ward. He complained frequently about this (R. 576, 738; 783-785; 789). Specifically, the record showed that Radovich "was fretful and crying, and he was complaining about he wanted to use the telephone to get in touch with the outside world and of course, that could not be granted to him" (R. 568-569). "He wanted to get in touch with his wife and see if he could talk to her, and, of course, that privilege was denied. * * * he said he wanted to get in touch with an

attorney, but he wasn't allowed to use the telephone" (R. 569). "He wanted to get in touch with some friends, he said, maybe on the field * * * he wanted to make a telephone call to get in touch with an attorney or his wife and baby and see what he could do" (R. 738-739). "The orders were the Major could not make any calls and he couldn't visit and have visitors" (R. 576).* After some two weeks of incarceration the respondent was permitted to make telephone calls to persons "on the post" after getting permission from the military authorities (R. 569-570; 576). All of his mail was censored "in and out" (R. 568).

The chief investigator in the office of the Provost Marshall at Mitchel Field was the only guard assigned to exercise Major Radovich (R. 780, 783). He testified that he received this assignment about two weeks after Major Radovich was incarcerated in the "nut" ward (R. 781), and that at this time Radovich "was complaining about being confined and he was complaining about not having counsel assigned to him to look out for his interests" (R. 576). The investigator further testified (R. 783-785):

> Q. When you came into contact in the relationship just stated with Major Radovich, will you tell me whether he was taking his confinement there contentedly or complainingly, or how? A. Well, he was complaining about his confinement and he wanted to get an attorney and he wanted to be released, and he made quite a strong complaint. I submitted that complaint to Major Anthony, and he took the necessary steps, and some time later I believe the Major was released.
>
> * * * * *
>
> Q. You do not know anything about his getting an attorney as a result of his complaint to you and you to Major Anthony? A. Yes, sir, a Mr. Bradspies went over to see him and I don't know whether Mr. Bradspies represented him. I don't believe he did. He just went over to talk to him. I don't believe he was the attorney.
>
> * * * * *

* The Provost Marshal (R. 781)

> Major Radovich knew Mr. Bradspies and mentioned his name, and wanted to know whether or not Mr. Bradspies would represent him, and I gave that information to Major Anthony that way.
>
> Q. What was the rank of Mr. Bradspies? A. He was a warrant officer, junior grade.
>
> Q. So far as you know, then, during the time of your visits there, which I assume continued until Major Radovich was released from confinement in that hospital, Major Radovich, so far as you saw or knew, had no assistance of counsel? A. No, I don't believe he did, no, sir.

Although Major Radovich was confined in the psychopathic ward "pending trial by general court-martial for violation of the 95th and 96th Articles of War" (R. 591, 766) on charges growing out of his transactions with Samuel Bayer and Elias Bayer (R. 597), charges were not served upon him as required by the 70th Article of War, (10 U.S.C.A. 1542) nor was he taken before a committing magistrate for arraignment on any charges preferred against him in the civil courts (R. 805). The military charges were finally served upon the respondent on May 30, 1945 (R. 587, 588). To account for the delay, the official report of the Staff Judge Advocate, made pursuant to the 70th Article of War (10 U.S.C.A. 1542), stated (R. 606):

> Delay. The charges were preferred on 10 August 1944. Investigation completed about 24 August 1944 and received at this headquarters 25 August 1944.
>
> The delay referring them (charges) for trial was at the specific request of the United States Attorney, Southern District of New York, who was taking action with a view to prosecution of the two civilians involved in paying the bribes to the accused.

The respondent was being held under the circumstances described above when he made the first confession to Agent Flynn on September 5 or 6, 1944. Flynn testified that he and another agent were taken to the respondent's place of confinement in the psychopathic ward by Lieutenant Colonel

Miller, the Assistant Staff Judge Advocate, whose office had referred the case to the United States Attorney (R. 541, 546); that Colonel Miller told the respondent that Flynn and his companion "were special agents of the Federal Bureau of Investigation, that we wanted to talk to him about this matter, and that it was up to him whether he wanted to tell us anything"; that Flynn told the respondent "that the Federal Bureau of Investigation was conducting an investigation into this matter and that we had come to him to get his story as to just what happened", and that Radovich then told the story without hesitation (R. 542, 543).

The record showed that Radovich was released from the psychopathic ward on September 16, 1944 (R. 591-593, 766, 767); that from September 16, 1944, to January 2, 1945, he was restricted to the confines of Mitchel Field; and that from January 2, 1945, to and including the date of the supplementary statement to Agent Flynn on March 15-17, 1945, he was under "administrative restraint", which meant that he could not leave Mitchel Field without the personal permission of the base commander (R. 595, 768, 791).

Flynn testified that when he wanted to see Radovich at Flynn's office he would "usually" call Lieutenant Colonel Miller, and "ask him to have Radovich at the office on such and such a date" (R. 537).[9]

The evidence taken in the absence of the jury also showed that on August 21, 1944, while confined in the psychopathic ward, Radovich tendered his resignation from the Army of the United States, for the good of the service (R. 596). This resignation was not forwarded to the Adjutant General by the respondent's commanding officer until January 27, 1945 (R. 597). The War Department refused to accept the resignation and ordered that the respondent be tried

[9] It may be noted that Major Radovich was ordered by the military authorities to report to the United States Attorney for the Southern District of New York "for temporary duty" not later than 10:30 o'clock on the morning of his trial in the District Court (R. 28, 42).

by court-martial (R. 600). On March 8, 1945, the respondent's commanding officer at Mitchel Field was advised of this action by the War Department, and ordered to inform Radovich (R. 600). The respondent, however, was not informed until after March 20, 1945 (R. 600, 601), *several days subsequent to his "supplementary" statement to Agent Flynn on* March 15-17. In forwarding the respondent's resignation to the War Department, under date of January 27, 1945, the respondent's commanding officer at Mitchel Field stated "The delay in forwarding this resignation was caused by the fact that the United States Attorney, Southern District of New York, New York City, requested that no action be taken in this case until he completed his investigation against the civilians who paid the bribe money" (R. 597).

At the hearing in the absence of the jury, Assistant United States Attorney Edward C. Wallace testified (R. 607 et seq.) that he talked to Major Radovich on several occasions prior to March 15, 1945, when Flynn began the taking of the second confession; that Radovich was served with a subpoena directing him to appear in Mr. Wallace's office for these talks; that the first talk occurred on or about November 10, 1944; that Agent Flynn was usually present at the talks. Mr. Wallace further testified that when he talked to Radovich he, Radovich, was justified in assuming that he was not going to be indicted with the Bayer brothers, since it was not the policy of the United States Attorney to proceed against military personnel who were subject to military discipline. It was admitted by the United States Attorney that Major Radovich was not named in the original indictment returned against Samuel Bayer and Elias Bayer in March 1945, but that the case was resubmitted to the grand jury and a second indictment was obtained which included Major Radovich; and that the reason for the resubmission of the matter to the grand jury was the refusal of Major Radovich, through counsel, to testify or to make any further statements to the United States Attorney (R. 613, 614, 619).

Upon the foregoing evidence, the District Court ruled as a matter of law that the "supplementary" confession made by the respondent to Agent Flynn on March 15-17, 1945 was voluntary and admissible (R. 655 et seq.) The respondent duly excepted (R. 659, 660). The District Court instructed the jury as follows with respect to the confession (R. 1140):

> Upon evidence which I heard during your absence I concluded, and held as a matter of law, that each of the statements of the defendants[10] which has been introduced in evidence was admissible because not coerced nor induced by promises, and purely for your consideration of the guilt or innocence of the person making the statement.
>
> I have also admitted for your consideration testimony in regard to the circumstances existing at the time and place of the making of these statements for your consideration, not on the question of whether the statements should have been admitted into evidence, but for such bearing as such facts and circumstances might have in your judgment on the weight and credibility of the statement. In other words, the primary question for you to determine in regard to these statements is whether or not they are true, or how much of them is true. It is entirely within your function to believe all of any statements or any part thereof, or none. And you should, of course, compare what is said in the various statements with the other facts and circumstances disclosed by the other evidence in the case.

Exception to the Court's charge was duly noted. (R. 1143).

The Court refused to give the following instructions requested by Radovich (R. 1113, 1114):

> You are instructed that if the statements claimed to have been made by the defendant Radovich to the government investigators were induced or coerced in any degree by the circumstances of his confinement at Mitchel Field, then you must reject such statements

[10] One statement by each defendant was introduced.

altogether, and you must not consider them for any purpose whatever. In this connection, you are further instructed that the burden is upon the government to prove beyond a reasonable doubt that the statements claimed to have been made were not so induced or coerced.

You are instructed that if the statements claimed to have been made to the government investigators by the defendant Radovich were induced by any promise or hope of immunity, leniency, benefit, or favor, held out to Radovich by the investigators either directly or by implication, then you must reject such statements altogether, and you must not consider them for any purpose whatever. In this connection, you are further instructed that the burden is upon the government to show beyond a reasonable doubt that the statements claimed to have been made by Radovich were not induced by promises or hopes held out by the investigators.

Exceptions to the Court's refusal to give the requested instructions were duly noted (R. 1143-1144).

II.

THE PLEA IN BAR

The indictment against Radovich, Samuel Bayer and Elias Bayer (R. 8-11) alleged that beginning on or about September 1, 1942, and continuing up to and including the date of the indictment (July 12, 1945), the three named defendants, and divers other persons whose names were to the grand jurors unknown, conspired and agreed

> to defraud the United States of its right to the conscientious, faithful, disinterested and unbiased services and judgment of officers of the United States Army, free from corruption, partiality, improper influence, bias, dishonesty and fraud and, more particularly, its right to the conscientious, faithful, disinterested and unbiased services and judgment of the defendant Walter V. Radovich as an officer of the United States Army, free from corruption, partiality, improper influence, bias, dishonesty and fraud.

The indictment further alleged that it was a part of the conspiracy and agreement

> that defendants Samuel Bayer and Elias Bayer would during the period aforesaid give sums of money amounting to approximately $7,000 to the defendant Walter V. Radovich, an officer of the United States Army, and a person acting for and on behalf of the United States in an official function under and by authority of the War Department, to wit, a Captain of the United States Army, with intent to influence the action of said defendant, Walter V. Radovich, and to induce him, in violation of his lawful duty, to transfer Private Martin Bayer, and Private Melvin Usdan, both soldiers in the United States Army, from and to various units of the United States Army in order that the said soldiers would not be attached to and be members of a unit of the United States Army which was about to be sent out of continental United States.

Before trial Radovich filed a plea in bar, setting up that he had previously been convicted and sentenced by a general court-martial for the same offense charged in the indictment. His plea in bar was as follows (R. 13):

> Now comes WALTER V. RADOVICH, one of the defendants herein, and pleads in bar to the indictment herein against him as follows:
>
> 1. On June 11, 1945, this defendant, then and now an officer of the United States Army, before a United States Army general court-martial having jurisdiction of the defendant and the offense charged, was arraigned upon charges preferred against him, pleaded not guilty, was tried, and on June 29, 1945, was convicted and sentenced by said general court-martial. A copy of said charges, findings, and sentence are herewith, Exhibit A.
>
> 2. Thereafter on July 12, 1945, a grand jury, duly empaneled in the District Court of the United States, Southern District of New York, returned in said court the indictment herein charging the defendant with the same offense as that for which he was tried, convicted and sentenced by said general court-martial.
>
> WHEREFORE, defendant prays that the said indictment against Walter V. Radovich be dismissed.

EXHIBIT A

RECORD OF TRIAL OF RADOVICH, WALTER V., MAJOR, AIR CORPS, MITCHEL FIELD, NEW YORK, BY GENERAL COURT-MARTIAL APPOINTED BY THE COMMANDING OFFICER, HEADQUARTERS FIRST AIR FORCE, MITCHEL FIELD, N. Y.—TRIED AT AIR BASE, MITCHEL FIELD, N. Y., 11, 27, 28, 29 JUNE 1945.

ARRAIGNMENT

The accused was then arraigned on the following charges an specifications—

CHARGE I: Violation of the 95th Article of War.

[Art. 95. *Conduct Unbecoming an Officer and Gentleman.*—Any officer or cadet who is convicted of conduct unbecoming an officer and a gentleman shall be dismissed from the service. Title 10, U. S. C., § 1567.]

SPECIFICATION 1: In that, Major Walter V. Radovich, (then Captain), Air Corps, did, at New York, New York, between 1 August 1943 and 31 August 1943, wrongfully and unlawfully accept and receive from one Samuel Bayer, the sum of $2000.00, lawful currency of the United States, for the purpose of effecting the transfer of Private First Class Martin B. Bayer and Technician Fifth Grade Melvin Usdan from Headquarters and Headquarters Squadron, I Fighter Command, to Medical Detachment, Station Hospital, Mitchel Field, New York.

SPECIFICATION 2: In that, Major Walter V. Radovich (then Captain), Air Corps, did, at Goldsboro, North Carolina, on or about 1 December, 1943, wrongfully and unlawfully accept and receive from Elias Bayer the sum of $5000.00, lawful currency of the United States, for the purpose of effecting the transfer of Private First Class Martin B. Bayer and Technician Fifth Grade Melvin Usdan from Project Number CA-281 (First Air Commando Group), an organization then alerted for overseas movement, to Second Ferrying Group, Second Ferrying Division, Air Transport

Command, an organization not alerted for overseas movement.

CHARGE II: Violation of the 96th Article of War.

[Art. 96, *General Article*.—Though not mentioned in these articles, all disorders and neglects to the prejudice of good order and military discipline, all conduct of a nature to bring discredit upon the military service, and all crimes or offenses not capital of which persons subject to military law may be guilty, shall be taken cognziance of by a general or special or summary court-martial, according to the nature and degree of the offense, and punished at the discretion of such court. Title 10, U. S. C. § 1568.]

SPECIFICATION 1: In that, Major Walter V. Radovich (then Captain), Air Corps, did, at New York, New York, between 1 August 1943 and 31 August 1943, wrongfully and unlawfully accept and receive from one Samuel Bayer, the sum of $2000.00, lawful currency of the United States, for the purpose of effecting the transfer of Private First Class Martin B. Bayer and Technician Fifth Grade Melvin Usdan from Headquarters and Headquarters Squadron, I Fighter Command, to Medical Detachment, Station Hospital, Mitchel Field, New York.

SPECIFICATION 2: In that, Major Walter V. Radovich (then Captain), Air Corps, did, at Goldsboro, North Carolina, on or about 1 December 1943, wrongfully and unlawfully accept and receive from Elias Bayer, the sum of $5000.00, lawful currency of the United States, for the purpose of effecting the transfer of Private First Class Martin B. Bayer and Technician Fifth Grade Melvin Usdan from Project Number CA-281 (First Air Commando Group), an organization then alerted for overseas movement, to Second Ferrying Group, Second Ferrying Division, Air Transport Command, an organization not alerted for overseas movement.

FINDINGS

Neither the prosecution nor the defense having anything further to offer, the court was closed and voted in the manner prescribed in Articles of War 31 and 43.

Upon secret written ballot, two-thirds of the members present at the time the vote was taken concurring in each finding of guilty, the court finds the accused:

Of Specification 1 of CHARGE I: GUILTY
Of Specification 2 of CHARGE I: GUILTY
Of CHARGE I GUILTY
Of Specification 1 of CHARGE II: GUILTY
Of Specification 2 of CHARGE II: GUILTY
Of CHARGE II GUILTY

SENTENCE

The court was closed, and upon secret written ballot two-thirds of the members present at the time the vote was taken concurring, sentenced the accused to be dismissed the service, to forfeit all pay and allowances due and to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for three (3) years.

The Government demurred to the respondent's plea in bar (R. 20). After argument the demurrer was sustained and an exception noted (R. 85). In sustaining the demurrer the District Court said (R. 83, 84):

> As to the plea of former jeopardy, filed by defendant Radovich, he asserts therein that he has heretofore been tried by a court-martial and convicted of substantially the same offenses as alleged in the indictment here, and that by virtue of the constitutional provision against double jeopardy, this prosecution must be dismissed. The Government, by its demurrer, admits the specific facts set out in the plea, but contends that the offense here charged is a different one, and therefore the constitutional provision against double jeopardy does not apply.
>
> The defendant contends that, since court-martial and district courts are courts of the same sovereign, that is, the United States, the constitutional inhibition against double jeopardy applies to prosecutions in such courts. Grafton v. United States, 206 U. S. 333. I agree with this contention. So the crux of the situation here is whether or not the offense charged against Radovich in

the indictment here is substantially the same as the offense for which he was tried by a court-martial.

The District Court held that the offense charged in the indictment was not substantially the same as the offense for which Radovich was tried by court-martial.

By motions at the close of the Government's case (R. 446) and again at the close of all of the evidence (R. 949) the respondent renewed his plea in bar. Both motions were overruled.

SUMMARY OF ARGUMENT.

I

The Circuit Court of Appeals was correct in holding that the initial confession made by the respondent in the psychopathic ward on September 5 or 6, 1944, after the respondent had been held there for a month, would have been inadmissible under the rule of *McNabb* v. *United States*, 318 U. S. 332 and *Anderson* v. *United States*, 318 U. S. 350. The Court was also correct in holding that the "supplementary statement" made by the respondent on March 15 and 17, 1945, to the same agent who took the first confession, was the fruit of the first, and therefore inadmissible under the principle of *Silverthorne Lumber Company* v. *United States*, 251 U.S. 385, and *Nardone* v. *United States*, 308 U.S. 338.

The confinement of Major Radovich in the psychopathic ward was improper and lawless from its inception. Under Article of War 69 (10 U.S.C.A. 1541), and Army regulations made pursuant thereto, the confinement of an accused pending trial by general court-martial is authorized only when necessary to prevent his escape or to restrain him from further criminal acts. The record affirmatively shows that the confinement of the respondent was not necessary, nor was it imposed, to prevent his escape or to restrain him from further crimes. Even if some restraint of the respondent was necessary—and it was not—there was no

justification whatever under the military law for holding him *incommunicado* for weeks in a ward for the insane, under conditions of cruel and deliberately planned hardship and oppression. Finally, Article of War 70 (10 U.S.C.A. 1541) required that upon the arrest or confinement of the respondent "immediate steps" be taken to try him "or to dismiss the charge and release" him, and that any officer "responsible for unnecessary delay in investigating or carrying the case to a final conclusion" be punished. This Article also specified that "when a person is held for trial by general court-martial the commanding officer will, within eight days after the accused is arrested or confined, if practicable, forward the charges to the officer exercising general court-martial jurisdiction and furnish the accused a copy of such charges. If the same be not practicable, he will report to superior authority the reasons for delay". As the Circuit Court of Appeals correctly held, the words "if practicable" were inserted in this statute "to provide for unusual situations arising out of the peculiar exigencies of military life"—in other words, a necessary delay under the statute is only that resulting from military exigency. In this case, however, "immediate steps" were not taken to try the respondent, and he was held for a month prior to his initial confession without being furnished a copy of the charges. The only excuse offered for the delay by the military authorities was that it was "at the specific request of the United States Attorney," and under the Article of War this was not a legitimate excuse. All of these circumstances of the respondent's confinement bring the initial confession of September 5 or 6 squarely within the principle of the *McNabb* and *Anderson* cases.

The second confession, of March 15-17, 1945, was made to the same agent who had obtained the initial statement from the respondent in the psychopathic ward; and the second was made under such circumstances that the conclusion is inescapable that it was the fruit of the first. The

second confession was therefore inadmissible under the principle of the *Silverthorne* and *Nardone* cases.

II

A. The argument of the Government, that the respondent's plea of former jeopardy must fail because his conviction by court-martial was disapproved upon review, is based upon matters which are not in the record and not properly before this Court. At the trial the Government demurred to the plea in bar, and the District Court decided the matter upon the plea and demurrer. If the Government desired to challenge the plea upon the facts, it should have done so at that time; and the attempt now made to try the facts in this Court, by injecting into the record new matter, is improper and unfair. The new matters which the Government attempts to place in the record, and which have to do with the opinion of the Board of Review and the action of the confirming and reviewing authorities in respect of the court-martial conviction of the respondent, are matters of which the respondent has no knowledge or notice. Moreover, since a court-martial is not a court of record, this Court should not take judicial notice of such matters. *McClaughry* v. *Deming*, 186 U. S. 49. As the Circuit Court of Appeals correctly held, "determination of whether or not jeopardy attached may therefore be more appropriately made when the full facts are in evidence on a new trial."

B. Even if the new evidence now offered by the Government should be considered by this Court, it would not affect the validity of the plea in bar. From the statements made in the Government's brief concerning the disposition of the military charges against Radovich, it appears that the findings and sentence of the court-martial have been finally disapproved and that the case has been dismissed. If this be so, then at military law the respondent has been once in jeopardy under the military charges, and he cannot be tried again in a military court for the offense alleged in those

charges, nor can he be tried for the same offense in the civil courts. Even if this Court should consider the extraneous matters which Government counsel have attempted to inject into the record, the decisive question would still be whether or not the military charges and the indictment allege substantially the same offense.

C. Proof of the allegations of the indictment would have sustained the military charges under which the respondent had previously been convicted. The trial of the respondent upon the indictment, therefore, put him twice in jeopardy for the same offense. The indictment alleged that the respondent, Samuel Bayer, and Elias Bayer conspired and agreed to defraud the United States of the faithful services of the respondent, an army officer, it being a part of the conspiracy or agreement that the respondent would accept $7,000 from the Bayers to induce the respondent to transfer Martin Bayer and Melvin Usdan to posts of safety. The military charges alleged that the respondent, an army officer, had been guilty of conduct unbecoming an officer and gentleman and conduct to the prejudice of good order and military discipline in that he had accepted $7,000 from Samuel Bayer and Elias Bayer, "*for the purpose of effecting the transfer*" of Martin Bayer and Melvin Usdan to posts of safety. The military charges were broad in their scope, and clearly included in their ambit an agreement to pay and receive money, and thus to defraud the United States in the manner specified in the indictment. In other words, proof of the allegations of the indictment would have justified a conviction under the military charges. Since proof of the indictment would have supported the military charges upon which the respondent had been once in jeopardy, the indictment cannot be maintained.

ARGUMENT

I

The Confession

The Government introduced in evidence against Major Radovich a written confession made by him to Special Agent Flynn of the Federal Bureau of Investigation on March 15 and 17, 1945. This statement, which was marked "Government's Exhibit 25" (R. 1306) and was admitted in evidence over the objection and exception of the respondent (R. 659), was the basis of the case against Radovich. The statement was in the handwriting of Flynn and was initialed and signed by Radovich. The Circuit Court of Appeals held that this statement was inadmissible, by reason of the fact that "it was patently the fruit" of an earlier confession which was taken from Radovich by Flynn and which was itself inadmissible (R. 1475). The first confession was made by the respondent in the psychopathic ward of the army hospital at Mitchel Field on September 5 or 6, 1944, after the respondent had been held there for a month. We shall demonstrate, first, that the initial confession was inadmissible under the rule of *McNabb* v. *United States*, 318 U. S. 322, and *Anderson* v. *United States*, 318 U. S. 350, and, second, that the later statement which was introduced in evidence was in fact the fruit of the first, and therefore inadmissible under the principle of *Silverthorne Lumber Company* v. *United States*, 251 U. S. 385, and *Nardone* v. *United States*, 308 U. S. 338.

As to the statement of September 5 or 6, 1944:

The record showed that Major Radovich, who was then 24 years old, returned to the United States from Burma in the late spring of 1944. While in Burma he had served with great gallantry and distinction as an officer of the First Air Commando Group (*supra*, page 5). On August 3, 1944, while stationed at the Santa Monica Redistribution Center, Santa Monica, California, he was ordered to report to Mitchel Field, New York. He proceeded to Mitchel Field

as ordered. Upon his arrival on August 9, 1944, he was immediately placed under arrest and locked up in the psychopathic or "nut" ward in the station hospital at the field (*supra*, page 7). He was held in the psychopathic ward from August 9, 1944, to September 16, 1944 (*supra*, pages 8, 11). In other words he had been held in the ward for approximately a month when he made the original confession to Agent Flynn. This confinement of Major Radovich in the psychopathic ward was improper and lawless from its inception.

Article of War 69 (10 U. S. C. A. 1541) provides:

> Any person subject to military law charged with crime or with a serious offense under these articles shall be placed in confinement or in arrest, as circumstances may require; but when charged with a minor offense only, such person shall not ordinarily be placed in confinement. Any person placed in arrest under the provisions of this article shall thereby be restricted to his barracks, quarters, or tent, unless such limits shall be enlarged by proper authority.

This Article of War in its present form was adopted in 1920. The Manual for Courts-Martial (1921) states (p. 40):

> The chief object of Congress in changing, by the code of 1920, the provisions of A. W. 69 relating to arrest and confinement was to lessen resort to confinement, particularly of enlisted men, in cases where restraint is not a necessity, *either to prevent the escape of the accused or to restrain him from violence, or for other like reasons. No soldier or officer will be ordered into, or retained in, confinement prior to trial by court-martial except where confinement is necessary for one of the reasons indicated.* (Emphasis supplied)

War Department Technical Manual T. M. 27-255, Military Justice Procedure (1945) accurately and authoritatively summarizes the law and regulations with respect to arrest and confinement pending trial (T. M. 27-255, pp. 15-16):

> b. *Necessity and purpose of restraint.* If an offense has been committed for which trial by court-martial is

required, the question of imposing some form of restraint on the accused pending trial must be considered. The purpose of such restraint is to insure the presence of the accused at the trial and to prevent him from committing other offenses in the meantime. A W 69 provides that when "charged with crime or with a serious offense" the accused "shall be placed in confinement or arrest as circumstances may require" but "shall not ordinarily be placed in confinement" when charged with a minor offense. It is *not* mandatory that the accused be restrained at all pending trial (par. 19, MCM). The necessity for any restraint must be determined in the light of the offense charged and the character of the offender. If some restraint is deemed necessary, only the minimum required under the circumstances should be imposed (par. 19, MCM).

c. *Types of restraint.* (1) A person in arrest is restrained within certain limits, not by physical force, but by his moral and legal obligation to obey the order or arrest (par. 139a, MCM). When placed in arrest he is required to remain within his barracks, quarters, or tent unless larger bounds, such as the company area, are specified (A W 69).

(2) By *confinement* the accused is physically restrained (par. 139a, MCM) either by being imprisoned in a guardhouse or being put under the control of a guard.

d. *Degree of restraint to be imposed.* No greater degree of restraint should be imposed than is required by the circumstances of the particular case. Unless physical restraint is necessary, an accused should not be placed in confinement pending trial. Confinement results in loss of manpower. Not only is the person confined unavailable for duty during his confinement, but the more soldiers there are in the guardhouse, the greater the number of guards who must be taken from other duties to control them. For minor offenses restraint in any form may be unnecessary. For example, there is usually no need to restrain a soldier who voluntarily returns after a few days' absence without leave. The fact that he has returned on his own accord is a good indication of his intention to stay with his

> organization. His availability for trial a few days later can safely be assumed. Arrest or restriction would in any event be futile if he should decide to run off again. On the other hand, a soldier who breaks restriction and remains absent without leave until apprehended, probably requires confinement since his past conduct indicates that only physical restraint will hold him with his organization. Even a person who commits a serious military offense, such as a sentinel who sleeps on post,[11] is not necessarily to be confined unless there is some basis for believeing that otherwise he will flee before trial. The question to be decided in each case is: what restraint, if any, is necessary to insure the presence of the accused at the trial and to prevent his doing harm to persons or property in the meantime.

In brief, the confinement of an accused pending trial by general court-martial is proper *only* when necessary to prevent his escape or to restrain him from further criminal acts. In the case of the respondent, the record affirmatively showed that his confinement was not necessary, nor was it imposed, to prevent his escape. He was an officer of the army, subject to military orders and discipline. He could have been restrained "by his moral and legal obligation to obey" an order restricting him. Had he fled he could have been shot for desertion. (A. W. 58, 10 U. S. C. A. 1530) During the days immediately preceding his confinement he traveled alone from California to Mitchel Field (*supra*, page 7). His Army efficiency ratings, a fair measure of his amenability to discipline, had always been "excellent" or "superior" (R. 598). There was not the slightest suggestion or reason to believe that he would not have been available at all times. After his release from the psychopathic ward he was available and subject to the beck and call of the military authorities and the United States Attorney during the many months preceding his trial (*supra*, page 11). When indicted in the District Court he was released in the "custody of the army" (R. 3), and he was

---

[11] A sentinel who sleeps on post may be sentenced to death. A. W. 86, 10 U. S. C. A. 1558.

not required to give bond until after his conviction (R. 7). The record affirmatively showed also that the confinement of Radovich was not necessary, nor was it imposed, to restrain him from further crimes. The offenses charged against him by the military authorities were alleged to have occurred more than eight months before his incarceration. There was no suggestion of any disposition on his part to commit further offenses; on the contrary the record showed that during the interval between the date of the alleged offenses and the date of his confinement he had become a hero of the war. Only six weeks before he was incarcerated he was awarded a second Distinguished Flying Cross for gallantry and devotion to duty (*supra*, page 6). After his release from the psychopathic ward the United States Attorney found him so "cooperative" that he was not named in the original indictment returned against his alleged co-conspirators. In short, therefore, the confinement of Major Radovich was grossly improper and unjustified, under military law.

Even if some restraint of the respondent was necessary—and it was not—there was no justification whatever in the military law for holding him *incommunicado* for weeks in a ward for the insane, under conditions of cruel and deliberately planned hardship and oppression. Under the law, if any restraint at all was deemed necessary, the military authorities were permitted to impose "only the minimum required under the circumstances" (T. M. 27-255, *supra*, page 25). We have already (*supra*, pages 7-10) detailed the conditions of the restraint imposed upon the respondent—conditions of cruelty and hardship which the Government's brief touches fleetingly if at all (Government's brief, pp. 10-11). To summarize: The respondent was stripped of his uniform, shoes, and all personal belongings, forced to wear hospital pajamas without a string and a bathrobe without a cord, and was locked in a barred and heavily guarded ward for the insane. He was watched constantly, night and day, even when he went to the bathroom. His food was served without a knife, and later he was de-

prived of both knife and fork, and required to eat with only a spoon. He was held *incommunicado*, denied visitors, denied the use of the telephone, denied counsel. All of this was done, notwithstanding the fact that the respondent showed no need for restraint, that there was nothing wrong with him mentally or physically, and that he was given no medical treatment. We challenge the Government to demonstrate that there was any legitimate reason or excuse for such restraint.

In this connection, counsel for the Government say in their brief (p. 42) that "an accused soldier is not, like a civilian charged with a noncapital offense, entitled to bail; he remains in custody. There is, of course, no bail at military law." This statement is misleading. While there "is no bail at military law", it does not follow that an accused must be confined; on the contrary, as we have shown, he should not be confined at all, except in unusual cases of necessity. It is not mandatory that he even be restrained at all; and if he is restrained, then his "moral and legal obligation to obey the order of arrest" is all the restraint or "bond" that is required.

The suggestion in the Government's brief (pages 33, 34, 56), that the respondent had the assistance of counsel during his incarceration in the psychopathic ward, is not supported by the record. As we have shown (*supra*, pages 8-10), at least two weeks after his confinement began the respondent complained to his guard, as he had done before, that he was being denied counsel. As a result of these complaints a warrant officer, junior grade, named Bradspies, who was a lawyer, finally talked to the respondent, *but he did not act as the respondent's attorney and in fact the respondent was without counsel during his entire imprisonment.*

Finally, in our consideration of the legality of the long confinement of the respondent, we come to Article of War 70 (10 U. S. C. A. 1541). That Article provides:

> When any person subject to military law is placed in arrest or confinement immediate steps will be taken to try the person accused or to dismiss the charge and release him. Any officer who is responsible for unnecessary delay in investigating or carrying the case to a final conclusion shall be punished as a court-martial may direct: When a person is held for trial by general court-martial, the commanding officer will, within eight days after the accused is arrested or confined, if practicable, forward the charges to the officer exercising general court-martial jurisdiction and furnish the accused a copy of such charges. If the same be not practicable, he will report to superior authority the reasons for delay.

As the Circuit Court of Appeals well said (R. 1474), the Article "is mandatory in tone and expressly provides for the punishment of any officer responsible for unnecessary delay in investigating or carrying a case to conclusion". *Prompt action is required.* Although the statute does not set up a complete time-schedule, the necessity for speed is recognized, and the degree of promptness that is required is indicated, by the following statement in Military Justice Procedure, War Department Technical Manual T. M. 27-255 (1945), page 36:

> In general court-martial cases, the charges should be investigated within 48 hours after they are preferred; should be sent to the officer exercising general court-martial jurisdiction within 24 hours after completion of the investigation and should be referred for trial within 48 hours after receipt by the officer exercising general court-martial jurisdiction. After being so referred they should promptly be served on the accused * * *.

While it is true that the statutory requirement that charges be served upon the accused within eight days after his arrest or confinement is qualified by the words "if practicable", it is plain that, as the Circuit Court of Appeals held, this qualification "was inserted to provide for unusual situations arising out of the peculiar exigencies of military

life". (R. 1474). The soundness of this construction becomes apparent when the present Article 70, enacted in 1920, is considered in the light of the old articles from which it is derived. The prior articles are printed in the Government's brief at pages 44 and 51. These old articles authorized delay "until such time as a court-martial can be assembled"; or in certain situations "at remote military posts or stations", or when "the necessities of the service prevent * * * trial". It is obvious that the modern expression "if practicable" is intended to be a synthesis of these old phrases, and to refer, as did they, to "situations arising out of the peculiar exigencies of military life".

When the confinement of Major Radovich is tested by the standards of Article of War 70 it is plain that the military authorities acted in lawless disregard of that Article. Radovich was incarcerated on August 9, 1944. The charges against him were preferred on August 10. The investigation was completed "about" August 24 and received by the officer exercising general court-martial jurisdiction on August 25, 1944 (*supra*, page 10). Yet the charges were not referred for trial and served on Radovich until May 30, 1945 (*supra*, page 10). Putting it another way, Radovich was held in the psychopathic ward for four weeks after the military investigation was completed. The military investigation had been over for two weeks when Flynn obtained the confession of September 5 or 6, 1944. And the only excuse for the delay, officially reported by the military authorities as they were required to do by the statute, was that it "was at the specific request of the United States Attorney, Southern District of New York, who was taking action with a view to prosecution of the two civilians involved in paying the bribes to the accused" (*supra*, page 10). This excuse for delay, having nothing to do with military necessity, was not a legitimate reason under the Article of War. Certainly the Article of War does not mean that the disposition of military charges shall be at the convenience of the United States Attorney.

Counsel for the Government in their brief (page 55), argue that the delay may be justified by the fact that "Radovich had submitted his resignation for the good of the service, and it would be reasonable to withhold decision as to trial until that request had been acted upon". Certainly the pendency of the resignation could not justify the long confinement of Radovich in the psychopathic ward. In any event, the resignation was submitted by the respondent on August 21, 1944, *and the respondent's commanding officer did not forward it to the Adjutant General, who alone could act upon it, until January 27, 1945.* And here again, to explain the delay, the authorities at Mitchel Field stated "The delay in forwarding this resignation was caused by the fact that the United States Attorney, Southern District of New York, New York City, requested that no action be taken in this case until he completed his investigation against the civilians who paid the bribe money" (*supra*, pages 11, 12). And more: although on March 8, 1945, the authorities at Mitchel Field were ordered by the War Department to inform Radovich that his resignation would not be accepted, and that he would be tried by court-martial, they did not so inform Radovich until March 20, 1945—in other words they delayed until Flynn had obtained the second confession from Radovich on March 15 and 17 (*supra*, pages 11, 12). It appears that the Army was being administered, not according to fairness and military law, but as the catspaw of the District Attorney and Agent Flynn.

Counsel for the Government also argue at length that the mistreatment of Radovich by the military authorities was in some way remedied by the fact that during the military investigation Radovich probably learned of the charges against him. We think that no argument is necessary to demonstrate that this fact—if it is a fact—could not cure the fundamental violations of law which the military authorities committed when they confined Radovich in the first place, when they held him for weeks under the conditions we have described, and when they failed promptly to

refer the charges against him for trial and promptly to serve a copy of these charges upon him as they were required to do by the Article of [redacted]. By their treatment of him the military authorities "subjected the accused to the pressures of a procedure which is wholly incompatible" with fairness and with the spirit and purpose of the Articles of War (see *McNabb* v. *United States*, 318 U. S. 332, 342); and the fundamental impropriety of their conduct cannot be glossed over by legalistic argument. In this connection we say further that to one familiar with the methods of criminal investigators the purpose behind the long and brutal confinement of Major Radovich is apparent: the purpose was *to insulate him* from the advice, assistance and support of his family, his friends, and counsel, and by systematic mistreatment to break him down until he would "talk". There could have been no other purpose; if government counsel believe that there was, then they are indeed naive. And we repeat, in the light of what was done in the execution of that purpose, talk about whether or not Radovich knew of the charges against him is futile.

From what has been said, we think that the conclusion is inescapable that the confession made by Radovich to Agent Flynn on September 5 or 6, 1944, in the psychopathic ward, falls squarely within the principle of the *McNabb* and *Anderson* cases. The analogy between those cases and this is complete. The unjustified detention of Radovich before confession was far longer than the detention of the defendants in those cases. The hardships of Radovich's detention were far greater, and far less defensible. Indeed this case presents a striking example of the lengths to which criminal investigators would go, were it not for the salutary doctrine of the *McNabb* and *Anderson* cases.

We now turn to the second confession, made by Radovich to Agent Flynn on March 15 and 17, 1945, and received in evidence against Radovich; and we shall demonstrate that this confession was the fruit of the first, and tainted with the same illegality.

Flynn testified that he took the March 15-17 confession from Radovich at the office of the Federal Bureau of Investigation in New York City; that Radovich, who at this time was stationed at Mitchel Field, came to Flynn's office at the request of Flynn; that before Radovich made the statement, Flynn warned him that it might be used against him (*supra*, pages 3-4). It appeared that on March 15-17 Radovich was under "administrative restriction" at Mitchel Field, which meant that he could not leave the limits of the Base without the personal permission of the commanding officer; and that Flynn arranged for the appearance of Radovich at Flynn's office by calling a Lieutenant Colonel Miller at Mitchel Field (*supra*, page 11). Colonel Miller's office had originally referred the case to the United States Attorney; and Colonel Miller was the officer who had introduced Flynn to Radovich in the psychopathic ward, upon the occasion when Radovich made the first confession to Flynn (*supra*, pages 10, 11).

Flynn testified that before taking the confession on March 15 and 17, 1945, he produced and showed to Radovich the confession which he had taken from Radovich on September 5 or 6, 1944. The statement of September 5 or 6, 1944, like that of March 15-17, was in the handwriting of Flynn and signed by Major Radovich. The March 15-17 statement on its face purported to be a "supplementary" statement, and Flynn admitted that it was "basically" the same as the previous statement taken on September 5 or 6, 1944. He said that the March statement "went into more detail", that "Major Radovich had told me many more instances or circumstances which I thought should go into the statement, and I decided to put it in and make it one complete statement". He said that before taking the supplementary statement, he read over the previous one and handed it to Radovich, who also read it over; that the first statement was on Flynn's desk when he wrote the second one; that he produced the first statement at the suggestion of Radovich. A request by counsel for Radovich that the District Attorney

produce the first written statement was denied by the District Attorney and by the Court, the ground of the Court's denial being that examination of the two statements by the Court revealed that there was no material conflict between them (*supra*, pages 4, 5).

Upon this state of facts we submit that anyone who recognizes what the Circuit Court of Appeals aptly described as "the practical realities of the situation" (R. 1474) must conclude that the second statement to Flynn was the fruit of the earlier one. The second was a mere supplement or continuation of the first, made to the same agent who had obtained the first. Since the first statement was inadmissible, and the second was the fruit of the poisonous tree, the second statement was likewise vitiated. *Silverthorne Lumber Company* v. *United States*, 251 U. S. 385; *Nardone* v. *United States*, 308 U. S. 338; *Watson* v. *United States*, 6 F. (2d) 870. As this Court said in *Nardone* v. *United States*, 308 U. S. 338, 340):

> To forbid the direct use of methods thus characterized but to put no curb on their full indirect use would only invite the very methods deemed 'inconsistent with ethical standards and destructive of personal liberty.' What was said in a different context in *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385, 392, 64 L. Ed. 319, 321, 40 S. Ct. 182, 24 A. L. R. 1426, is pertinent here: 'The essence of a provision frobiding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the court, but that it shall not be used at all.'

The situation in the case at bar is unlike that in *Lyons* v. *Oklahoma*, 322 U. S. 596, cited in the Government's brief. In that case, after improper coercive methods were used to obtain a confession, a second statement was made in another place and with different persons present; and the second statement was used at the trial. This Court held that the second statement was not shown to have been the unavoidable outgrowth of the first, and that the introduction in evidence of the second statement therefore did not

constitute a violation of due process. In the case at bar, however, the second statement purported on its face to be "supplementary" to the first and it was made to the same agent who had taken the first, under such circumstances that the conclusion that it was derived from and the unavoidable outgrowth of the first statement is inescapable. Furthermore, the decision in *Lyons* v. *Oklahoma* did not involve unlawful confinement, or a violation of a statute requiring prompt arraignment or prompt service of charges; on the contrary the decision depended only upon the question whether or not the effect of prior coercion had *in fact* been dissipated before a second confession was made. Obviously the principle of the *McNabb* and *Anderson* cases was not involved in the *Lyons* case.

II.

The Plea in Bar

A. The argument of the Government, that the respondent's plea of former jeopardy must fail because his conviction by court-martial was disapproved, is based upon matters which are not in the record and not properly before this Court. These new and extraneous matters, which counsel for the Government have attempted to place in the record, have to do with the opinion of the Board of Review and the action of the confirming and reviewing authorities in respect of the court-martial conviction of the respondent.[12]

At the trial the respondent filed a plea of former jeopardy (*supra*, page 15). The Government demurred to this plea and the District Court decided the matter upon the plea and demurrer. The District Court said (R. 83, 84, *supra*, page 18):

> As to the plea of former jeopardy, filed by defendant Radovich he asserts therein that he has heretofore been tried by a court-martial and convicted of substantially the same offense as alleged in the indictment

[12] See Government's brief, pp. 2, 15, 27, 28, 61-68, 110-125.

here, and that by virtue of the constitutional provision against double jeopardy, this prosecution must be dismissed. *The Government, by its demurrer, admits the specific facts set out in the plea, but contends that the offense here charged is a different one*, and therefore the constitutional provision against double jeopardy does not apply.

The defendant contends that, since court-martial and district courts are courts of the same sovereign, that is, the United States, the constitutional inhibition against double jeopardy applies to prosecution in such courts. Grafton v. United States, 206 U. S. 333. I agree with this contention. So the crux of the situation here is whether or not the offense charged against Radovich in the indictment here is substantially the same as the offense for which he was tried by a court-martial.

If the Government desired to challenge the plea in bar upon the facts, it should have done so at that time. The plea was filed on September 26, 1945, and the Government's demurrer was filed on October 3, 1945 (R. 4). The opinion of the Board of Review, which counsel for the Government now seek to inject into the record, and upon which they rely in their attack upon the plea in bar, was dated August 17, 1945 (Government's brief, Appendix C, page 110); and the record shows that a copy of this opinion was in the possession of the United States Attorney when the demurrer was filed (R. 41, 42, 1475). The attempt of counsel to bring this opinion and other new matters into the record at this time, and thus to try the facts in this Court, is improper and unfair. In this connection it is important to note that the opinion of the Board of Review, and the other military proceedings subsequent to the conviction of the respondent by court-martial, are matters of which the respondent has no knowledge or notice (see R. 42). This was recognized by the Circuit Court of Appeals and was not denied by the Government in that Court or in the District Court (R. 1475, 1476; 41-43). Moreover, since a court-martial is not a court of record, this Court should not take

judicial notice of such matters. *McClaughry* v. *Deming*, 186 U. S. 49. As the Circuit Court of Appeals wisely held, "determination of whether or not jeopardy attached may therefore be more appropriately made when the full facts are in evidence on a new trial" (R. 1476).

B. Even if the new and extraneous evidence concerning the military proceedings, which the Government now offers, should be considered by this Court, it would not affect the validity of the plea in bar.

Article of War 40 (10 U. S. C. A. 1511) provides:

> No person shall, without his consent, be tried a second time for the same offense; but no proceeding in which an accused has been found guilty by a court-martial upon any charge or specification shall be held to be a trial in the sense of this article until the reviewing and, if there be one, the confirming authority shall have taken final action upon the case.

Counsel for the Government state in their brief (pp. 63-64; 124-125) that in the court-martial case of Major Radovich the Board of Review and the Judge Advocate General held that the record of trial was "legally insufficient to support the findings of guilty and the sentence", that "the findings of guilty and the sentence" were, therefore, "disapproved", by order of the Secretary of War; that no rehearing was ordered and that none can be, now. This means, of course, that the case has been dismissed.[13] The dismissal of the case in turn means that "final action upon the case" has been taken within the meaning of A. W. 40—in other words jeopardy has attached and the re-

[13] Under A. W. 50½, when a reviewing or confirming authority has disapproved or vacated a finding and sentence by reason of the action of the Board of Review, approved by the Judge Advocate General, holding the record of trial legally insufficient to support the findings or sentence, only four alternatives are provided for further action in the case: (1) a rehearing may be ordered, (2) the findings or sentence may be approved in part only, (3) the record may be returned for revision, (4) the case may be dismissed. In the case of Radovich the Government concedes that alternatives (1), (2), and (3) were all rejected by the authorities.

spondent cannot be tried again for the offense charged against him before the court-martial. There can be no question that this is the military law. Thus the Manual for Courts-Martial (1921), recognized as authoritative by counsel for the Government, states (par. 149, p. 119):

> *Limitation as to Number of Trials.*—(a) No person shall be tried a second time for the same offense. (A. W. 40.)
>
> (b) A person subject to military law has not been "tried" in the sense of A. W. 40 * * * in any case, until either an acquittal has been announced in open court, or else, after conviction, the reviewing and, if there be one, the confirming authority *shall have taken final action upon the case (A. W. 40), i.e. shall have ordered execution of the sentence or dismissed the case.* (Emphasis supplied)

Counsel for the Government attempt to draw an analogy between the action of the reviewing and confirming authorities in the case of Radovich and the dismissal of an indictment in a criminal case in the civil courts (Government's brief p. 64). The analogy fails completly, for as we have seen the dismissal of the military case operates as an acquittal, whereas, of course, the dismissal of an indictment has no such effect. For the same reasons no parallel can be drawn between the dismissal of the military case and the reversal of a criminal conviction in the civil courts.

From the foregoing it is plain that even if this court should consider the new and extraneous matters which counsel for the Government have attempted to place in the record, the decisive question would still be whether or not the military charges and the indictment alleged substantially the same offense.

C. The military charges and the indictment did allege substantially the same offense.

It is established that one convicted by a military court of competent jurisdiction cannot be tried a second time in a Federal civil court for the same offense. *Grafton* v. *United*

States, 206 U. S. 333. The question therefore is whether or not the offense of which the respondent was convicted and sentenced by general court-martial was the same or substantially the same as that alleged in the indictment. In answering that question "The test is, whether, if what is set out in the second indictment had been proved under the first, there could have been a conviction; when there could, the second can not be maintained; when there could not, it can be." *Manning* v. *United States*, 275 Fed. 29, 31 (C. C. A. 8, 1921), citing Bishop's Criminal Law (8th Ed.) par. 1052, subd. 2; *Morgan* v. *Devine*, 237 U. S. 632, 641, 35 Sup. Ct. 712, 59 L. Ed. 1153; *Carter* v. *McClaughry*, 183 U. S. 365, 394, 22 Sup. Ct. 181, 46 L. Ed. 236; *Burton* v. *United States*, 202 U. S. 344, 384, 26 Sup. Ct. 688, 50 L. Ed. 1057, 6 Ann. Cas. 362.

Proof of the allegations of the indictment would have supported the conviction of the respondent under the military charges and specifications. This becomes apparent when the charges and specifications are considered in the light of military law and precedent.

The indictment alleged that the respondent, Samuel Bayer, and Elias Bayer, conspired and agreed to defraud the United States of the faithful services of the respondent, an army officer, it being a part of the conspiracy and agreement that the respondent would accept $7,000 from the Bayers to induce the respondent to transfer Martin Bayer and Melvin Usdan to posts of safety. The military charges alleged that the respondent, an army officer, had been guilty of conduct unbecoming an officer and gentleman, in violation of A. W. 95, and conduct to the prejudice of good order and military discipline, in violation of A. W. 96, in that he had accepted $7,000 from Samuel Bayer and Elias Bayer, "*for the purpose of effecting the transfer*" of Martin Bayer and Melvin Usdan to posts of safety.

The 95th and 96th Articles of War, 10 U. S. C. A. 1567, 1568, (formerly the 61st and 62d articles) are military

common law articles.[14] Conduct which violates them must be specified but need not be, and usually is not, given a name; whether conduct does or does not violate the articles is determined by a court-martial in the light of service custom and precedent. As the Circuit Court of Appeals pointed out, charges under these articles are the "broadest and most inclusive of military charges" (R. 1475). According to military common law, conduct which in any manner defrauds, or tends to defraud, the Government of its rights, or which violates or neglects official duty, or prejudices military command and good order and discipline, *including conspiracies*, is cognizable under these articles. *In fact, any conspiracy to defraud the Government, except the particular fraud specified in Article 94 (10 U. S. C. A. 1566) must be charged under Articles 95 and 96.* Specifically, the charge made in the indictment was cognizable at military law under the 95th and 96th Articles of War and *only* under those articles. See Manual for Courts-Martial (1943) 186, 187; Winthrop, *Military Law and Precedents* (2d Ed. 1920) pages 710 et seq., 720 et seq.

The military charges clearly included in their scope an agreement or conspiracy to pay and receive money, and thus to defraud the United States as alleged in the indictment. The acceptance and receipt of money by Radovich involved, and was alleged by the military charges to include, the participation of the Bayers. An allegation of agreement and concurrence between Radovich and the Bayers was

[14] *Article 95* (10 U. S. C. A. 1567). *Conduct unbecoming an officer and gentleman.*—Any officer or cadet who is convicted of conduct unbecoming an officer and a gentleman shall be dismissed from the service.

Article 96 (10 U. S. C. A. 1568). *General article.*—Though not mentioned in these articles, all disorders and neglects to the prejudice of good order and military discipline, all conduct of a nature to bring discredit upon the military service, and all crimes or offenses not capital, of which persons subject to military law may be guilty, shall be taken cognizance of by a general or special or summary court-martial, according to the nature and degree of the offense, and punished at the discretion of such court.

thus implicit in the military charges. Indeed it seems absurd to argue, as the Government apparently does, that Radovich could have accepted the money from the Bayers "for the purpose of effecting the transfer" of the named soldiers, in the absence of an agreement and a common design between him and the Bayers. Our conclusion in this respect is fully supported by the authorities. *Gebardi* v. *United States*, 287 U. S. 112, 122; *United States* v. *Katz*, 271 U. S. 354, 355; *Norris* v. *United States*, 34 F. (2d) 839, 841; *United States* v. *Dietrich*, 126 Fed. 664, 667; *United States* v. *N. Y. C. & H. R. R. Co.*, 146 Fed. 298; *United States* v. *Sager*, 49 F. (2d) 725; cf. *United States* v. *Zeuli*, 137 F. (2d) 845. Thus it follows that a finding by the court-martial that Radovich corruptly agreed or conspired to accept and receive money for the specified purpose would have been entirely consistent with the military charges. Such a finding moreover would have been proper under military law and would have supported a verdict of guilty of the charges: A corrupt agreement by Radovich to accept the money for the specified purpose would, of course, have constituted conduct unbecoming an officer and gentleman and conduct to the prejudice of good order and military discipline in violation of A. W. 95 and A. W. 96; and if the proof had shown such an agreement—that is if the proof had shown only those things charged against Radovich in the indictment, but had fallen short of showing the actual giving and receiving of the money—then under age-old military practice the particular military specification would have been amended by the court-martial to conform to the proof, and a conviction upon the charges would have followed. In any event, as the Circuit Court of Appeals said, whatever the evidence before the court-martial may actually have been, "it is hard to believe that careful distinction was made, or could have been made, between the actual giving and receiving of the money for the purpose involved and the arrangement made to that end" (R. 1475). The argument of the Government,

that the court-martial would have acquitted Radovich if only the corrupt agreement had been proved, is literally fantastic.

The flexibility of military charges and specifications, the wide latitude allowed to a court-martial in making findings thereunder, and the vast scope of the 95th and 96th Articles of War, are well illustrated by the following quotations from Winthrop, *Military Law and Precedents* (Second Edition, 1920) 380, 381, 383, 384:

> Where a court-martial determines that the accused is guilty of a *specification* but not precisely as laid, that is to say is guilty of a part but not of the remainder, or is guilty of the substance of the entire specification but not of certain details, it may, and it is its duty, in convicting him theron, to except specifically from the finding of Guilty such portions as are not proved, and thus declare the *exact measure* of the criminality deemed to be established. Thus it may find him Guilty of the facts set forth in certain of the averments, and Not Guilty of those set forth in certain other averments; or it may find him Guilty of the specification as a whole except only as to certain designated words, amounts, articles, quantities, or other matters of description set forth therein. Having thus shaped its finding on the specification according to the proof, it may find the accused Guilty of the *charge*, provided of course there is enough left in the specification to support the charge.
>
> * * * * * * *
>
> The authority of a court-martial to make a partial finding is not limited to the mere making of exceptions. Where, while the allegations in a specification are substantially made out, certain items therein are not precisely proved as averred, the court, in excepting the same, may *substitute* the true facts or details as established by the evidence. As, for example, where sums of money, numbers of things, kinds of quantities of articles, species of military stores, etc., words spoken, names of persons, dates, or places, have been incorrectly set forth in the specification, and the true particulars have been disclosed in the course of the testimony on the trial; in such cases the court, in its finding of Guilty, may and properly will except the erroneous

and substitute for them the correct statements or words of description. The authority to make substitution is subject to the same conditions as the authority to make exceptions, *viz.*, that the specifications shall not be rendered legally defective, or the nature of the offence so modified that the finding upon the specification will not support a conviction upon the charge.

In regard to the authority to except and substitute in findings, it may be remarked that it is certainly one of no little practical value and convenience. By its exercise defects in the pleadings may to a considerable extent be remedied, and variances between the pleadings and the proof be in the main cured. Moreover, the finding is thus made to correspond with the precise facts of the case, justice to both sides is more nearly done, and the accused is the more effectually protected against a second prosecution based upon the same transaction.

. . . . . .

Though at one time otherwise ruled, it is now fully settled by the uniform practice of the service that where the charge is of one of the specific designated offences made punishable by the Articles of War other than the general, or 62d Article, and the evidence fails fully to sustain the charge as laid, but fixes upon the accused a neglect of duty or disorder as involved in the acts alleged in the specification, the court may properly find him Guilty of the specification, (with such exceptions, etc., as may be required) and Not Guilty of the charge but Guilty of Conduct to the prejudice of good order and military discipline.

This finding, of an offence in violation of the General Article under a charge for a violation of a specific Article, was first sanctioned where the charge was 'Conduct unbecoming an officer and a gentleman,' in violation of Art. 61, and is still most frequently resorted to thereunder. It has since, however, been extended to *all cases of charges of specific offences* made punishable by the code, having been especially applied to such as Disobedience of Orders, Disrespect to a commanding officer, Mutiny, Misbehavior before the enemy, Breach of Arrest, Violations of Art. 60, and—in time of war—Violations of Art. 58.

> The legal theory upon which this form is based is that it is a finding of *a lesser included offence*, every specific offence being viewed as including either *a neglect of duty or a disorder in breach of discipline;* and it is resorted to in order to prevent the failure of justice which would in general be incurred were it not availed of.

In conclusion we submit that, as the Circuit Court of Appeals held, "from any realistic viewpoint" the offense alleged in the indictment and the offense alleged in the military charges are identical. It follows that since Radovich had been once in jeopardy in the military proceedings, the indictment against him for the same offense cannot be maintained.

CONCLUSION

The confession received in evidence against the respondent was inadmissible. The trial of the respondent placed him twice in jeopardy for the same offense. The decision of the court below was right and should be affirmed.

Respectfully submitted,

SAMUEL T. ANSELL
ROGER ROBB
Attorneys for Respondent,
Tower Building
Washington 5, D. C.

March 25, 1947.